89-1591

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS R. SCHWARZ,
Petitioner,

vs.

THE FLORIDA SUPREME COURT,
acting by Justices Raymond Ehrlich, Ben F. Overton, Leander J. Shaw, Rosemary Barkett, Stephen H. Grimes & Gerald Kogan, Dissent by Parker Lee McDonald,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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85pp

QUESTIONS PRESENTED FOR REVIEW

The decision of the court below, review of which is sought, directly concerns the federal issue raised in this petition, to-wit: (1) The conditions under which and the scope of permissible intrustion — if any — by a state regulatory body into the rights secured by the First and Fifth Amendments to the United States Constitution to persons forced to associate and not free to protest by withdrawal; and, (2) The delegation to private persons (the "Florida Bar" management) of the power to determine whether or not to compel the political association of licensees under amorphous and uncertain directions from the delegative authority and beyond the scope of the powers of the court to regulate and license attorneys and administer and supervise courts.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

DECISION BELOW

The decision of the Florida Supreme Court, review of which is sought, is reported as *The Florida Bar Re Schwarz,* 552 So.2d 1094 (Fla. 1989), Timely rehearing denied December 19, 1989.

An intermediate decision is reported at 526 So.2d 56 (1988) and is reproduced and attached as Appendix E to this petition.

The decision reported at 552 So.2d 1094, including dissent, is reproduced and attached as Appendix F to this petition.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C., Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this case are the First, Fifth, and Fourteenth Amendments to the United States Constitution. The Florida statutory matter at issue is the "Rules Regulating the Florida Bar," Chapter 1, Section 2-3.2(c); Chapter 1-2.

STATEMENT OF THE CASE

This cause originated as an ex parte petition filed by Thomas R. Schwarz in the Florida Supreme Court. Petitioner Schwarz is an attorney licensed to practice law in Florida continuously since 1970. As a licensed attorney, petitioner is compelled by the Florida Supreme Court in the exercise of its implied legislative power to regulate and license attorneys to become a member of "The Florida Bar." He is required to pay an annual license fee. "The Florida Bar" activities and its rules for members are legislated and adopted by the order of the Florida Supreme Court. This body of law is known as "Rules Regulating the Florida Bar."

"The Florida Bar" is a sui generis institution created by The Florida Supreme Court in 1949. That court found constitutional powers to exist by implication for its creation of "The Florida Bar." *Petition of Florida State Bar Association,* 49 So.2d 902 (Fla. 1949).[1] The present constitutional provisions relevant

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[1] This Court presently has before it the case of *Keller v. California Bar*. That case differs from this in that the California Bar, unlike the "Florida Bar," is a corporation created by the legislature and derives powers from it and the California Supreme Court. The instant case involves pure exercise by the Florida Supreme Court of legislative regulatory power prohibited to it by the Florida constitution.

thereto are found in Article I, Sections 2 and 3, Article II, Section 3, and Article V, Section 15 of the Florida Constitution.

The ex parte petition requested that the Florida Supreme Court adopt proposed amendments to the "Rules Regulating the Florida Bar" set out in the petition. These proposed rule amendments specifically defined the scope of political activity in which the "Florida Bar" might engage and the methods and procedures it would be required to follow. In the alternative, the petition requested that the Florida Supreme Court create and receive recommendations from an independent study commission, and then act.

The petitioner's standing and use of the ex parte form of petition grew out of the failure of the "Florida Bar" to submit the proposed rule amendments to its annual membership meeting as required by the "Rules Regulating the Florida Bar," Rule 2-10.2.

The Florida Supreme Court issued its order directed to the "Florida Bar" to show cause why the ex parte petition should not be granted. The "Florida Bar" filed its response substantially admitting the factual allegations. It opposed the request for specific definition of its political activity powers. The ex parte petition, the court's order to show cause, and the response of the "Florida Bar," are reproduced as Appendices A, B, and C to this petition. The petitioners reply to the response is reproduced as Appendix D to this petition.

The issues were argued before the Florida Supreme Court. The latter subsequently issued an order referring the matter for study to The Florida Judicial Council, which was directed to file its report by January 1989. *The Florida Bar Re Schwarz,* 526 So.2d 56 (Fla. 1988). Adoption of the recommendations of the Florida Judicial Council was set for argument before the Florida Supreme Court on June 5, 1989. Various parties were permitted to appear, pro and con, including one Joseph W. Little,

supporting the petitioner.[2] The court thereafter issued its opinion adopting certain recommendations of the Council with respect to the matter and, on December 19, 1989. denied Little's timely motion for rehearing and clarification. The opinion and decision became the final action of the Florida Supreme Court on December 19, 1989. *The Florida Bar Re Schwarz,* 552 So.2d 1094 (Fla. 1989).

This petition for certiorari review follows.

QUESTIONS PRESENTED FOR REVIEW

The decision of the court below, review of which is sought, directly concerns the federal issue raised in this petition, to-wit: (1) The conditions under which and the scope of permissible intrustion — if any — by a state regulatory body into the rights secured by the First and Fifth Amendments to the United States Constitution to persons forced to associate and not free to protest by withdrawal; and, (2) The delegation to private persons (the "Florida Bar" management) of the power to determine whether or not to compel the political association of licensees under amorphous and uncertain directions from the delegative authority and beyond the scope of the powers of the court to regulate and license attorneys and administer and supervise courts.

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[2] The ex parte petition to the Florida Supreme Court sought only action by that court. The Florida Bar was invited by the show cause order to participate and the following individuals were permitted participation: The Florida Bar, The Florida Bar Center, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; Barry Richards, Counsel, 101 E. College Ave., Tallahassee, Florida 32302; Joseph W. Little, College of Law, University of Florida, Gainesville, Florida 32611; Ben L. Bryan, Jr., P.O. Box 1000, Ft. Pierce, Florida 34954; and Henry P. Trawick, Jr., 2051 Main Street, P.O. Box 4019, Sarasota, Florida 34230.

REASONS FOR GRANTING THE WRIT

Among the considerations governing certiorari review, Supreme Court Rule 17(b) lists the circumstance wherein a state court of last resort has decided a federal question so as to conflict with another state court of last resort or a Federal Court of Appeals. As a ground for review Rule 17(b) includes decision by a state court of last resort of an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way which conflicts with applicable decisions of this Court.

All three of such bases for review are present in this case.

I.

THE DECISION OF THE FLORIDA SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF THE UNITED STATES COURTS OF APPEAL

In its decision in *The Florida Bar Re Schwarz,* 552 So.2d 1094 (Fla. 1989), the Florida Supreme Court has exercised its implied legislative power to regulate petitioner and its more than 40,000 licensees. In doing so, it has created a direct conflict between itself and this Court and the United States Court of Appeals for the First and Eleventh Circuits, as well as numerous Federal District Courts.

A. In the exercise of its legislative function regulating attorneys and the practice of law, the Florida Supreme Court has forced licensees to associate with and fund its administrative arm, the "Florida Bar." It has created a forced political association. It has delegated to private citizens (the "Florida Bar" management) the power to force licensee engagement in political activity without meaningful definition of its scope, mode, or method of exercise and without relation to its licensing, regulatory, or administrative powers.

This action conflicts directly with the limiting doctrines of vagueness and broadness of intrusion on First Amendment

rights by state action. This doctrine is set out by this Court in *United States v. Robel,* 389 U.S. 258 (1967) L.C. 275, 276 (citations omitted).

> "The area of permissible indefiniteness narrows, however, when the regulation invokes criminal sanctions and potentially affects fundamental rights, as does ~~§ 5(a)(1)~~(D). . . . This is because the numerous deficiencies connected with vague legislative directives whether to a legislative committee, . . . to an executive officer, . . . or to private persons, . . . are far more serious when liberty and the exercise of fundamental rights are at stake. . . .
>
> * * * * * *
>
> . . . Formulation of policy is a legislature's primary responsibility, entrusted to it by the electorate and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people. "[S]tandards of permissible statutory vagueness are strict * * *" in protected areas. NAACP v. Button, 371 U.S., at 432, 83 S.Ct., at 337, 9 L.Ed.2d 405. "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them." Greene v. McElroy, 360 U.S. 474, 507, 79 S.Ct. 1400, 1419, 3 L.Ed.2d 1377."

Robel, supra, at 275-276.

These doctrines are embodied in other decisions of this Court beginning with *Thornhill v. Alabama,* 310 U.S. 88 (1940); *Dombroski v. Pfister,* 380 U.S. 479, 491; *Grayned v. City of Rockford,* 408 U.S. 104 (1972); and others.

In *Gibson v. Florida Bar,* 798 F.2d 1564 (CCA 11, 1986), the Eleventh Circuit declared the phrases "advancement of the science of jurisprudence" and "administration of justice" to be "amorphous." Having no form, such a description of the scope of intrusive activity affecting First Amendment rights of the petitioner and others conflicts with the foregoing decisions of this Court.

The provisions for partial refund to licensee-objectors do not overcome the basic infirmities of forced political association grounded in vagueness and overbroadness. An undefined predicate cannot form the basis for intrusion into First Amendment rights of free political association. The decision of the Florida Supreme Court to the contrary conflicts with this Court's ruling in *Cantwell v. Connecticut,* 310 U.S. 296, 317; *NAACP v. Button,* 371 U.S. 415, 433; and others.

Where the scope of delegated power to intrude in the First Amendment area is vague and without meaningful definition, the attempted delegated exercise of that power is so pervasive as to be unconstitutional. The decision of the Florida Supreme Court to the contrary conflicts with the rulings in *Romany v. Colegio de Abogados de Puerto Rico,* 742 F.2d 32 (CCA 1, 1984); and, on second review, *Schneider v. Colegio de Abogados de Puerto Rico,* 682 F.Supp. 674 (DDR 1988).

B. The forced association of more than 40,000 licensees is compelled by the Florida Supreme Court. Licensees are forced to be associated with the political views of the private citizens managing the "Florida Bar." This compulsion lends to those views a power and effectiveness drawn at least in part from unwilling licensees. This Court has for many years recognized that, in the political arena, advocacy of public and private points of view is "enhanced by group association": *Buckley v. Valeo,* 424 U.S. 1 LC 15.

> "The First Amendment protects political association as well as political expression. The constitutional

> right of association explicated in *NAACP v. Alabama,* 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958), stemmed from the Court's recognition that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee " 'freedom to associate with others for the common advancement of political beliefs and ideas,' " a freedom that encompasses " '[t]he right to associate with the political party of one's choice.' " *Kusper v. Pontikes,* 414 U.S. 51, 56, 57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973), quoted in *Cousins v. Wigoda,* 419 U.S. 477, 487, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975)."

Buckley v. Valeo, 424 U.S. 1 (1976); see also, *Clean Up 84 v. Heinrich,* 759 F.2d 1511, 1513 (CCA 11, 1985).

No procedural device can eliminate the association by the public of dissenting members with political views abhorrent to them. Where the delegation of power to Bar management is vague and indefinite and the association is compelled, the invasion of free association is a fait accompli. No post hoc due process can alter that fact.

This case thus presents to the Court the opportunity to decide these fundamental and underlying constitutional principles as they relate to Bar regulation throughout the United States. Absent such decision, a plethora of cases involving particular political or social association activities will perforce continue to be spawned. The state courts, with or without approval or sanction by the legislative branch, consistently refuse to provide specifics or definition of their claimed powers delegated to their associations. Lack of definition of underlying power leaves the petitioner and the hundreds of thousands of others similarly situated in forced association with abhorrent ideological positions. Under the Florida Supreme Court criteria even the

Delphic oracle or the all-seeing prophet cannot know the basis for intrusion into constitutional rights or what compelling state interest justifies it. The ex parte petition in this case and the "Florida Bar's" response to the Florida Supreme Court's show cause order illustrate the range and extent which such intrusions take.

CONCLUSION

The conflict of opinions of this and other federal courts with the Florida Supreme Court on the propriety of intrusion of the First and Fifth Amendment rights of lawyers by compulsory Bar associations (governmental courts) is clear. Some such agencies reject analagous decisions of this Court. Others have attempted reconciliation. None, however, have examined the fundamental relationship between the source of supposed power, its delegation, and the restrictions upon that delegation. The phrase "promote the science of jurisprudence" was properly held by the Eleventh Circuit to be "amorphous." *Gibson, supra.*

Formless phrases cannot be utilized to define areas in which delegated legislative activity may deprive individuals of property and compel their ideological association with a class from which there is no escape.

The treatment of underlying basic limits on the compulsory membership in integrated Bar associations, postponed in this Court's decision in *Lathrop v. Donahue,* 367 U.S. 820 (1961), is now ripe for decision.

The justification for the independence of the Judiciary in #78 Federalist Papers, on the ground that the independent Judiciary would have no sword or purse, is threatened. Through the integrated "Florida Bar," the Florida Supreme Court has created a purse of millions of dollars unaccountable as state revenue. It has through its arm, the "Florida Bar," engaged in political wars. It has taken up the sword of unrestrained political propa-

ganda in all fields of substantive law, unrelated to the regulation of attorneys, function of the courts, or the administration of the laws of the state. This is shown by the ex parte petition in this case and the "Florida Bar's" response to the show cause order. The subject matter of forced political association and its range is not contested.

Regardless of post hoc refund of any pro rata contribution to funding, all licensees are by forced association tarred with the same political brush. Petitioner and dissenters are represented to the public as supporting or opposing particular political positions. Court interference through "Florida Bar" political activity is particularly offensive when applied to popular initiative situations — initiative which is intended to be preserved exclusively to the people by Article I of the Florida Constitution.

Petitioner prays that this Court issue its writ to the Florida Supreme Court, review its decision, and require it to define or define for the Florida court the meaningful and permissible limits of the scope, manner, and method in intruding upon petitioner's First and Fifth Amendment rights. Such a decision would provide much-needed and suitable guidance for courts regulating hundreds of thousands of lawyers throughout the United States.

DATED: March 19, 1990.

Respectfully submitted,

THOMAS R. SCHWARZ
Petitioner, Counsel of Record Pro Se
4561 N.W. 79th Avenue
Lauderhill, Florida 33351
Telephone: (305) 742-6979

By: Thomas R. Schwarz

APPENDIX

INDEX TO APPENDIX

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

In Re:

Ex Parte Petition of Thomas R. Schwarz

EX PARTE PETITION OF THOMAS R. SCHWARZ

(Filed June 4, 1987)

COMES NOW THOMAS R. SCHWARZ, Florida Bar No. 129383, and respectfully petitions this Court to forthwith consider such procedures as are prayed for herein or as it otherwise deems appropriate, the amendments to the Rules Regulating The Florida Bar proposed in the Exhibits attached to this petition.

As grounds therefor, your petitioner states as follows:

1) By letters to the Executive Director of The Florida Bar on February 2, 1987 and pursuant to the provisions of Rules 2-10.1 and 2-10.2, petitioner proposed amendments to the Rules Regulating The Florida Bar. The proposal under Rule 2-10.1 is marked as Exhibit I to this petition. The proposal under Rule 2-10.2 is marked as Exhibit II.

2) Pursuant to Rule 2-10.1, the Exhibit I proposal was directed to the Board of Governors of The Florida Bar for consideration.

3) Pursuant to Rule 2-10.2, the Exhibit II proposal was directed for consideration of the next general membership meeting of The Florida Bar.

4) The proposed amendments relate to definition and limitation of the scope and procedure for the exercise of political power by this Court's official arm, and to democratization of the Rule amendment process.

5) Upon receipt of these letters and proposed amendments, pursuant to communication by telephone and letter with the Executive Director of The Florida Bar, it was agreed that the proposal before the Board of Governors would be taken up at its May 1987 meeting - later advanced to the March 1987 meeting in Tallahassee. The proposals were at that meeting referred to the Legislative Committee for consideration.

6) No discussion or correspondence was had by your petitioner with the Executive Director with respect to disposition of the Exhibit II proposal.

7) Your petitioner had adopted the dual-procedure approach as a courtesy to the Board of Governors, the leadership of which was on record as opposed to limitation of its political activity and democratization of voting on the amendment process.

8) At that time and to date, after some ten months, the Board of Governors has not complied with the mandate of the United States Court of Appeals for the Eleventh Circuit regarding political funding, one narrow area of the proposed amendments relating to political activity.

9) Through misunderstanding, confusion in communication, or otherwise, the proposed amendments embodied in Exhibit II have not been published in The Florida Bar News as required by Rule 2-10.2(b) nor in any official program as required by Rule 2-10.2(c). Petitioner has been deprived of his rights under the Rules to have such amendments considered at the regular meeting of The Florida Bar scheduled for June 10 - 14, 1987).

10) On May 14, 1987 the Board of Governors' meeting to consider the regular report of the Legislative Committee took the following action:

(a) Reviewed the television commercials designed to create public political support for its sales tax position in the Legislature and for court action;

(b) Considered means of coordinating and allying its actions on the sales tax exemption with other groups;

(c) Voted to take political action, among others, on various legislative proposals ranging from (i) Lien priority on vessels polluting by oil spills; (ii) Negligence standards for acts in emergencies; (iii) Service of process on corporate defendants; (iv) Insurance requirements for hospitals and physicians with respect to tort actions.

(d) These actions were urged on the basis of:

I) Ad hominem arguments including

A. Neurosurgeons were engaged in a conspiracy;

B. The Legislative Committee which had considered the matter was stacked by having on it only two representatives of the Academy of Florida Trial Lawyers, a plaintiff's organization;

C. The insurance companies providing medical malpractice coverage were gouging the public, making unconscionable profits.

II) Fatuous legal arguments

A. If the practice group of physicians at risk was too small, simply include others in the group;

B. fixing different standards of care for acts in emergencies was unknown historically and would deny access to the courts;

(e) In each case the charade of a vote that the matter came within the "purview" of this Court's delegation of power to the Board, was taken - the charade growing out of this Court's failure by its rules to place limits or define the scope of its delegation of political power to its official arm.

(f) Took no action on the amendments proposed by your petitioner.

11) This Court has full and exclusive power to consider these amendments to its Rules as proposed by petitioner on petition or sua sponte.

12) Petitioner states that:

(a) The constitutional provisions of Articles I, II, and III of the Florida Constitution.

(b) The provisions of Amendments I, IV, and V of the United States Constitution, and

(c) Avoidance of the scandal, impropriety, and appearance of impropriety stemming from this Court's justices judging their own cases all require that this Court define and limit the political activity delegated to its arm.

13) This Court, acting by and through its official arm in a claimed exercise of political power undefined as to scope, has used its funds, prestige, private lobbyists, public relations firms, and publicized specious social arguments deemed appropriate in political activity in an unsuccessful but continuing effort to persuade the Legislature to restore the exemption from sales tax on the fees of private lawyers.

14) This Court, acting by and through its official arm, is now attempting to pursue its unsuccessful political aims by using its funds, power, prestige, facilities, and personnel to initiate and prosecute a lawsuit in the Circuit Court of Leon County - a court which functions under the superintending control of this Court. The matter is ultimately to be decided in this Court.

15) The complaint in the Leon County action has not been published in the Florida Bar News, this Court's official publication. From general press reports your petitioner believes it is predicated in substantial part on legal principles urged against nondiscriminatory taxes which were rejected seventy-five years

ago. It is consistent with the efforts of other groups to preserve special tax privileges.

16) This situation is a rerun of the political, then legal, action in connection with the 1984 Amendment 9 initiative and is an inevitable consequence of this Court's engagement in the exercise of political activity of undefined and unlimited subject matter scope. The socio-historic political arguments were as specious in 1984 as they are now, and were called to the Court's attention by letter of February 1985.

17) Your petitioner states that while the Federal courts may fashion limited and ad hoc remedies at the petition of this Court's law licensees, in such contests this Court uses its funds, power, personnel, and prestige in attempts to prevent the effectiveness of such actions. The petitioner and others similarly situated have no adequate remedy in the unfair and unequal access to such courts by virtue of the inequality of resources available from this court.

18) Your petitioner states that his forced association with this Court's arm in its political activity is regarded as dishonorable as to him and others similarly situated.

19) Your petitioner states that:

(a) Only this Court can provide actions suitable to removal of (i) The impropriety of judging its own cause in political activity; (ii) The sense of dishonor associated with forced association in political activity; (iii) The obstacles to independent, equal, and fair examination of the systemic consequences in the continuation of the claim to unbridled political activity of its arm;

(b) Only this Court can decide to continue to draft its law licensees into an army of unwilling soldiers and sunshine politicians, or to commission them as officers of a court of law;

(c) Only this Court can obviate by system treatment the use of the Federal courts on an ad hoc basis for establishment of limits and procedures on its political activities;

(d) Only this Court can remedy in particular the deprivation of petitioner's right to propose amendments to the general membership of its arm - such deprivation occasioned by misunderstanding, mistake, or otherwise of the administrators of its official arm.

WHEREFORE, your petitioner respectfully prays that:

A) The Court appoint and fund an independent commission having a six-month life, with its mission

(1) To study and report on the legality, propriety, scope, and procedures, if any, through which this Court may exercise political power considering Articles I, II, and V of the Florida Constitution, the Code of Judicial Conduct, and such other materials and ethical principles as it may deem appropriate.

(2) To recommend to the Court the adoption of the rules herein proposed or such others if and as the independent commission may deem appropriate.

(3) To have representation on such commission of the Law Schools and Political Science Schools of the University of Florida, Florida State University, the Legislature, the Attorney General, the Court's arm, the media, your petitioner, or other parties the Court may deem interested and knowledgable in the subject matter.

(4) And for such other and further relief as may seem meet and proper in the circumstances.

Respectfully submitted,

THOMAS R. SCHWARZ
(Fla. Bar #29383)
4561 N.W. 79th Avenue
Lauderhill, Florida 33321
(305) 742-6979

/s/ Thomas R. Schwarz

EXHIBIT I

THOMAS R. SCHWARZ
Attorney and Counsellor at Law
4561 Northwest 79th Avenue
Lauderhill, Florida 33321
(305) 742-6979

February 2, 1987

Mr. John Harkness
Executive Director of the Florida Bar
The Florida Bar Center
Tallahassee, Florida 32301-8226

Dear Mr. Harkness,

Thomas R. Schwarz, Bar #129383, proposes the following amendments to the rules regulating the Florida Bar pursuant to Rule 2-10.1.

First: It is proposed that Chapter 2, Section 2-3.2(c)4, be amended by adding to that section after the semi-colon the following language to wit:

(a) provided however that no such program shall consider or concern itself with current proposed or contemplated changes in the law except those directly related to the organization, administration funding, creation or supervision of the system of Courts or the licensing, admission to practice or disciplining of lawyers and further provided that such programs of information and advice shall be executed by formal written communication by the Board of Governors (showing members dissent where applicable) to the officials of the courts or other branches of government. No funds shall be expended for lobbying or public relations activity in association with any pro-

gram developed under this section nor contributed to any Political Action Committee.

(b) Nothing in this section shall inhibit or prohibit or prevent any member officer or employee of the Florida Bar from freely expressing his or her private support, opinion, or advice on any current proposed or contemplated law or legislation in such fashion as she or he shall choose.

Second: It is proposed that Chapter 2, Section 2-10.2 and Section 2-10.2(a), in the following particulars to wit:

(a) By deleting from Section 2-10.2 the language "present and voting".

(b) By adding the following language to Section 2-10.2(a).

(1) The executive director shall prepare a ballot, yea or nay, on each proposed amendment and shall not less than 45 days prior to the commencement of the meeting at which the amendment is to be considered, send such ballot to all members of the Florida Bar.

(2) Ballots may be voted by mail returned to the Executive Director, postmarked not less than 7 days prior to the commencement of the meeting. Ballots may be voted at the meeting by depositing the same with the Executive Director within the first three hours after the opening of the meeting.

(3) The Executive Director shall thereupon tabulate the vote and certify such tabulation at the first session of the second day of such meeting.

(4) Adoption of rejection shall be on the basis of a majority vote. Upon a tie vote the proposed amendment fails.

Very truly,

Thomas Rowe Schwarz

EXHIBIT II

THOMAS R. SCHWARZ
Attorney and Counsellor at law
4561 Northwest 79th Avenue
Lauderhill, Florida 33321
(305) 742-6979

February 2, 1987

Mr. John Harkness
Executive Director of the Florida Bar
The Florida Bar Center
Tallahassee, Florida 32301-8226

Dear Mr. Harkness,

Thomas R. Schwarz, Bar #129383, proposes the following amendments to the rules regulating the Florida Bar pursuant to Rule 2-10.2.

First: It is proposed that Chapter 2, Section 2-3.2(c)4, be amended by adding to that section after the semi-colon the following language to wit:

(a) provided however that no such program shall consider or concern itself with current proposed or contemplated changes in the law except those directly related to the organization, administration funding, creation or supervision of the system of Courts or the licensing, admission to practice or disciplining of lawyers and further provided that such programs of information and advice shall be executed by formal written communication by the Board of Governors (showing members dissent where applicable) to the officials of the courts or other branches of government. No funds shall be expended for lobbying or public relations activity in association with any pro-

gram developed under this section nor contributed to any Political Action Committee.

(b) Nothing in this section shall inhibit or prohibit or prevent any member officer or employee of the Florida Bar from freely expressing his or her private support, opinion, or advice on any current proposed or contemplated law or legislation in such fashion as she or he shall choose.

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(3) The Executive Director shall thereupon tabulate the vote and certify such tabulation at the first session of the second day of such meeting.

(4) Adoption or rejection shall be on the basis of a majority vote. Upon a tie vote the proposed amendment fails.

Very truly,

Thomas Rowe Schwarz

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

TUESDAY, JUNE 16, 1987

The Florida Bar

Re: Thomas R. Schwarz

Case No. 70,702

ORDER TO SHOW CAUSE

WHEREAS, the Court has determined that the Petition demonstrates a preliminary basis for relief, this is to command The Florida Bar to show cause on or before July 1, 1987, why the Petition should not be granted. Petitioner may serve his response on or before July 13, 1987.

/s/ Sid J. White
Clerk of the Supreme Court of Florida

A True Copy

TEST:

Sid J. White sg
Clerk Supreme Court. cc: Honorable John F. Harkness, Jr.
Thomas R. Schwarz, Esquire
John A. Boggs, Esquire

SUPREME COURT OF FLORIDA
Tallahassee 32301

June 16, 1987

Sid J. White
Clerk
Debbie Causseaux
Chief Deputy Clerk

Telephone
904-488-0125

Honorable John F. Harkness, Jr.
Executive Director
The Florida Bar
Tallahassee, Florida 32301-8226

Re: The Florida Bar, Thomas R. Schwarz
Case No. 70,702

Dear Mr. Harkness:

Please find enclosed herewith the original and copy of the Order to Show Cause in the above cause. Please endorse your acceptance of service on the original and return same to this office.

Thank you for your cooperation in this matter.

Most cordially,

Sid J. White
Clerk Supreme Court

SJW: sg
Enclosure

cc: Thomas R. Schwarz, Esquire
John A. Boggs, Esquire

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

Case No. 70,702

THE FLORIDA BAR,

Re: Thomas R. Schwarz

RESPONSE TO ORDER TO SHOW CAUSE

(Filed July 27, 1987)

Respondent, THE FLORIDA BAR ("the Bar"), hereby responds to the Ex Parte Petition of Thomas R. Schwarz and this court's Order to Show Cause, and respectfully states:

RESPONSE TO ALLEGATIONS OF PETITION

1. The Bar admits Petitioner's allegations concerning the existence and substance of the cited letters marked as Exhibits I and II to the Ex Parte Petition of Thomas R. Schwarz.

2. The Bar admits that Petitioner's correspondence marked as Exhibit I was to be ultimately considered by the Board of Governors of The Florida Bar under Rule 2-10.1 of the Rules Regulating The Florida Bar ("Bar Rules").

3. The Bar admits that Petitioner's correspondence marked as Exhibit II was to be ultimately considered at the next General Membership Meeting of The Florida Bar under Bar Rule 2-10.2.

4. The Bar admits that Petitioner's proposed amendments seemingly relate to a definition and limitation of the scope and procedure for the exercise of political power by The Florida Bar as an official arm of the Supreme Court of Florida; the Bar denies that such amendments necessarily relate to any "democratization" of the Bar's rule amendment process.

5. The Bar admits Petitioner's allegations concerning the disposition by the Board of Governors of his proposal contained in Exhibit I.

6. The Bar admits Petitioner's allegations concerning the disposition of his proposal contained in Exhibit II.

7. The Bar is without knowledge of Petitioner's motive for seeking the proposed amendments to various Bar Rules; the Bar denies that its leadership is on record as opposed to limitation of its political activity and democratization of voting on the amendment process.

8. The Bar denies that its Board of Governors has not complied with the mandate of the United States Court of Appeals for the 11th Circuit regarding political funding; the Bar admits that political funding constitutes at least one area of Petitioner's proposed amendments contained in Exhibits I and II.

9. The Bar admits Petitioner's allegations concerning the disposition of his proposal contained in Exhibit II.

10. The Bar admits that on May 14, 1987, its Board of Governors met to consider the regular report of its Legislation Committee:

a. The Bar denies that its Board of Governors reviewed television commercials designed to create political support for its sales tax position in the legislature and for court actions — the Board merely viewed various television news accounts of the Bar's circuit court litigation to challenge the application of the Florida Sales Tax to certain legal services;

b. The Bar admits its Board of Governors considered means of coordinating and allying its actions on the sales tax exemption with other groups—but opted against such activity;

c. The Bar admits its Board of Governors authorized political action on various legislative proposals cited by Petitioner, including—

(i) legislation regarding lien priority on vessels polluting by oil spills (for the Corporation, Banking & Business Law Section of The Florida Bar, exclusively, to oppose with its own voluntary dues and independent funds, further contingent on the concurrence of both the Bar's Real Property, Probate & Trust Law and Environmental & Land Use Law Sections);

(ii) legislation regarding negligence standards for acts in emergencies (for The Florida Bar to actively oppose);

(iii) legislation regarding service of process on limited partnerships (for the Corporation, Banking & Business Law Section of The Florida Bar, exclusively, to oppose with its own voluntary dues and independent funds); and

(iv) legislation regarding insurance requirements for hospitals and physicians with respect to tort actions (for The Florida Bar to actively support).

d. The Bar admits Petitioner's allegations as to the general content of certain arguments, among many others, expressed during the Board's consideration of political action on various legislative proposals; the Bar denies Petitioner's argumentative characterization of such discussion as "ad hominem" or "fatuous."

e. The Bar admits that its Board, in consideration of political action on various legislative proposals, followed The Florida Bar's Legislative Policies & Procedures within Standing Board Policy 900 by confirming, through majority vote, that each matter was within the scope of the

authority of this organization under Bar Rules; The Bar denies Petitioner's argumentative characterization of such action as a "charade" and Petitioner's allegation that the Supreme Court of Florida has failed to place limits upon or define the scope of political power delegated to The Florida Bar.

f. The Bar admits Petitioner's allegations concerning the Board's disposition of his proposed amendments.

11. The Bar admits Petitioner's allegations concerning the Supreme Court of Florida's power to consider Petitioner's proposed amendments; the Bar denies such amendments are properly presented in this action under applicable Bar Rules.

12. The Bar denies that Petitioner's cited arguments require that the Supreme Court of Florida define and limit the political power delegated to The Florida Bar, premised on Petitioner's assumption that this Court has failed to place limits upon or define the scope of such power.

13. The Bar admits that it utilized funds in advocating the complete exemption for all legal services from the Florida Sales Tax; the Bar denies Petitioner's other argumentative allegations regarding its authority, means and methods for its legislative activity relating to the Florida Sales Tax; the Bar is without knowledge whether its actions in this regard constitute those of the Supreme Court of Florida, as alleged by Petitioner.

14. The Bar admits that it, and other parties, initiated circuit court litigation to challenge the application of the Florida Sales Tax to certain legal services; the Bar is without knowledge whether its actions in this regard constitute those of the Supreme Court of Florida, as alleged by Petitioner.

15. The Bar admits that the full text of its circuit court complaint has not been published in The Florida Bar *News*, although that legal action was the subject of a 27 column-inch story beginning at the top of page 1 of the May 15, 1987 *News*

issue; the Bar denies Petitioner's analysis and characterization of its legal argument espoused in that litigation.

16. The Bar denies Petitioner's additional argumentative characterization of its circuit court litigation, and Petitioner's continuing premise that this court has failed to place limits upon or define the scope of any political power delegated to The Florida Bar; the Bar is without knowledge whether its actions in this regard constitute those of the Supreme Court of Florida, as alleged by Petitioner.

17. The Bar denies that its involvement in federal court actions cited by Petitioner prevents the effectiveness of any contest of its legislative activities; the Bar is without knowledge as to the adequacy of such federal court remedies as alleged by Petitioner, and is without knowledge whether its actions in this regard constitute those of the Supreme Court of Florida.

18. The Bar is without knowledge as to Petitioner's regard for his association with The Florida Bar and its political activities.

19. The Bar denies that the Supreme Court of Florida is the only source of relief for the alleged impropriety and wrong suffered upon Petitioner and others, and through its argument which follows will demonstrate this organization's continuing ability to responsibly provide such relief when appropriate.

ARGUMENT IN OPPOSITION TO PETITION

A. The Supreme Court of Florida has defined the scope of The Florida Bar's legislative activities.

Within the governing documents of The Florida Bar and the case law which has interpreted them, there is ample guidance from the Supreme Court of Florida and other courts as to the definition and scope of this organization's legislative activities.

The Bar's very existence as an integrated body resulted from a 1949 opinion of this Court acknowledging: "[The Bar] is not a

compulsory union but a necessary one to secure the composite judgment of the bar on questions involving its duty to the profession and the public." *Petition of Florida State Bar Association,* 40 So.2d 902, 908 (Fla. 1949).

This organization's current charter, approved by this Court on July 17, 1986, reiterates The Florida Bar's fundamental activities as an official arm of the Supreme Court of Florida: "The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." Rules Regulating The Florida Bar 1-2.

When presented with a proposal to prohibit The Florida Bar's engagement in any political activity or use of funds and personnel for such purpose, this Court reviewed eight representative legislative activities of the Bar — constitutional revision, two separate refinements of Article V, establishment of the District Courts of Appeal, merit rentention of appellate judges, creation of the Judicial Qualifications Commission, approval of the Interest on Trust Accounts program, and support of Florida Legal Services, Inc. — and concluded: "All the above enumerated political activities are closely related to lawyers' 'duty to the profession and the public,' synonyms, certainly, for the improvement of the administration of justice and the advancement of the science of jurisprudence." *The Florida Bar,* 439 So.2d 213, 214 (Fla. 1983).

B. The Supreme Court of Florida Has Limited the Scope of The Florida Bar's Legislative Activities.

Constrained by the purposes enumerated within its organic charter, The Florida Bar has promulgated additional policies which bear upon its legislative activities. Those, too, have been the subject of scrutiny by the Supreme Court of Florida. Standing Board Policies 900, "Legislative Policy and Procedure," in their present form show no material variance from the verbiage reviewed by this Court in 1983, prompting this observation:

> The significance of this legislative policy to the instant petition is that "[n]either The Florida Bar nor any of its committees or sections may take a position on legislation either as a proponent or opponent unless it is determined by the Board of Governors that the legislation is related to the purposes of The Florida Bar as set forth in the Integration Rule." Standing Board Policy 900 §9.10(a). As a further safeguard, the Board of Governors, the legislation committee, and the executive committee allow any interested person to appear before it in support of or in opposition to any legislative proposal being considered. *Id.* §9.11(b). Petitioners have made known to this Court no individual who has been refused the opportunity to present his argument to any of the groups. Indeed, in some instances arguments have been presented to all three.
>
> Finally, petitioners are made cognizant of the fact that any attorney "is still free to voice his own views on any subject in any manner he wishes. He can do this even though such views be diametrically opposed to the position taken by the unified bar of his state." *In re Unification of the New Hampshire Bar,* 109 N.H. 260, 266, 248 A.2d 709, 713 (1968). This may take the form of working within the Bar itself or its committees or it may be through external means. But he is never forced to adhere to or proclaim any political view or engage in any personally-repugnant political activity.

The Florida Bar, 439 So.2d 213, 214-215 (Fla. 1983).

Continuing its analysis of the Bar's internal safeguards against capricious legislative involvement present within Standing Board Policies 900, this Court concluded:

> We therefore hold that, *as limited by the standing Board policy on legislation,* the political activities of the Board of Governors of The Florida Bar, including the expending of money and employing of personnel, are germane to the

> compelling state interest in the improvement of the administration of justice and the advancement of the science of jurisprudence and hence constitutionally permissible.

The Florida Bar, 439 So.2d 213, 215 (Fla. 1983) (Emphasis supplied).

C. The Florida Bar Continues to Seek Improvements in Its Legislative Procedures that are Reflective of Constitutional Requirements and Sensitive to Member Concerns

As indicated by the instant petition, the previously cited actions, and other proceedings in the federal courts, The Florida Bar's legislative activities have generated periodic opportunities for introspection and refinement in the face of member challenge. Indeed many integrated bars have witnessed this phenomenon of late: *Schneider v. Colegio de Abogados de Puerto Rico,* 565 F.Supp. 963 (D.P.R. 1982); *Arrow v. Dow,* 544 F.Supp. 458 (D.N.M. 1982); *Petition of Chapman,* 509 S.2d 753 (N.H. 1986); *Keller v. State Bar of California,* 226 Cal. Rptr. 448 (Cal. App. 3 Dist. 1986); *Falk v. State Bar of Michigan,* 411 Mich. 63, 305 N.W. 2d 201 (1981).

The most recent contest of The Florida Bar's legislative activities at the appellate level has occurred within the United States Court of Appeals for the 11th Circuit, stemming from a member challenge initiated in the United States District Court for the Northern District of Florida, in the case of *Gibson v. The Florida Bar,* 798 F.2d 1564 (11th Cir. 1986).

In remanding that action to the Northern District Court, the 11th Circuit acknowledged that the trial court's entry of a judgment in favor of The Florida Bar "was based on a review of the Bar's Policy 900" (*Id.* at 1569) a document with which the appellate court seemingly found no fault.

The 11th Circuit's resolution of *Gibson* included an analysis of United States Supreme Court cases upholding the constitu-

tionality of an integrated state bar and those involving the analogous situation where union members are required to favorably support union lobbying measures through compelled membership dues or agency shop fees. After repeated citations to *Abood v. Detroit Board of Education,* 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) — which addressed whether union service fees compelled by law as a condition of continued employment could be used for political and idealogical purposes — the 11th Circuit concluded its opinion by noting what seems to be the current federal law applicable to legislative activities of any integrated bar:

> It should be stressed that this opinion addresses only the use of compelled fees by the Bar. *Abood* specifically noted that the union was free to politicize on any issue of interest to that group. *See* 431 U.S. at 235, 97 S.Ct. at 1799. Only the use of compelled funds was prohibited for issues unrelated to collective bargaining. *Id.* Similarly, the Bar may speak as a group on any issue as long as it does so without using the compulsory dues of dissenting members.

Id. at 1569-1570.

Of further significance was the court's closing footnote, which observed:

> 5. Although the question of proper remedy is not before this court, this aspect of the *Abood* opinion suggests that the difficult task of discerning proper Bar position issues could be avoided by one of two methods: (1) a voluntary program in which lawyers would not be compelled to finance the Legislative Program, but could contribute towards that program as they wished; or (2) a refund procedure allowing dissenting lawyers to notify the Bar that they disagree with a Bar position, then receive that portion of their dues allotted to lobbying. [According to testimony at trial, each lawyer's share of the lobbying budget amounts to approximately $1.50]. Lawyers would only

> have to notify the Bar of a general disagreement, since the first amendment also protects an individual's right not to disclose his benefits. *See Abood, supra,* at 241, n. 42, 97 S.Ct. at 1802, n. 42.

Id. at 1570 (footnote 5).

Consistent with the *Gibson* ruling, The Florida Bar has taken steps to fashion a "proper remedy" to address what the 11th Circuit termed "the difficult task of discerning proper Bar position issues."

At the Board of Governors September 18 & 19, 1986, meeting—just three days following rendition of the 11th Circuit *Gibson* opinion—Bar governors considered the various options for dealing with potential member objections to legislative positions taken on behalf of this organization. The Legislation Committee was directed to prepare a comprehensive report on both the "check-off" and "refund" systems, for action by the Board of Governors at its next scheduled meeting in November 1986.

Meeting during November 13-15, 1986, the Board of Governors approved the "refund" option, in concept, for resolution of member protests to legislative positions adopted on behalf of the Bar. The official Board minutes detailing the highlights of that suggested procedure were shared with the United States District Court for the Northern District of Florida, for consideration during a March 12, 1987, hearing on defendants' motion on the mandate in the *Gibson* proceeding.

Following that hearing, Judge Maurice Paul issued a March 13 order that the *Gibson* action be held in abeyance for 70 days to allow a written refund policy to be finalized by the Bar, for ultimate Florida Supreme Court approval. To allow for adequate member notice and to assure appropriate Florida Supreme Court review of such procedure, the Bar favored the codification of such refund policy as an amendment to existing Bar Rule 2-9.3 regarding "Legislative Policy."

However, due to the timing of Judge Paul's March 13 order and the advance scheduling of the March 19-21 regular Board of Governors meeting, the Bar was unable to consider the "refund" concept as a possible amendment to Chapter 2 of the Rules Regulating The Florida Bar. This was because of Bar Rule 2-10.1's requirement that: "Any member of The Florida Bar or any interested person may propose amendments to this chapter by delivering a copy of the proposed amendment to the executive director of The Florida Bar at least ten (10) days prior to any regular meeting of the Board of Governors." Rules Regulating The Florida Bar 2-10.1.

Nevertheless, in order to immediately commit The Florida Bar to a "refund" concept in dealing with legislative objections from its members, the Board of Governors approved in March a codified protest procedure—as an amendment within Standing Board Policies 900, "Legislative Policy and Procedure"—on March 20. To assure Florida Supreme Court review of that procedure, the Board of Governors also voted to proceed toward adoption and "elevation" of this identical verbiage—as an amendment to Bar Rule 2-9.3—at its May session, when the 10-day requirement of Bar Rule 2-10.1 could be met.

A report of that March Board action was provided to Judge Paul on April 1, along with a revised computation of the time necessary for the Bar's refund procedure: to be previewed by the general membership prior to Board consideration; to receive Board approval as a proposed rule amendment; to be republished in final text for additional membership consideration and feedback; and, presumably, to secure ultimate Florida Supreme Court approval, with or without member objections on file. That update resulted in a May 7, 1987, order from Judge Paul, extending the period to September 1, 1987, in which the Gibson case would be held in abeyance, premised upon final action by this Court adopting an official legislative objection procedure within Chapter 2 of the Rules Regulating The Florida Bar.

Upon the joint recommendation of The Florida Bar's Rules & Bylaws Committee and its Legislative Committee, the policy was approved as a proposed bylaw amendment at the Board of Governors May 14-15 session. The measure was duly noticed in appropriate member publications and is now before this Court in another proceeding: *See The Florida Bar; Re: Amendment to Bylaw 2-9.3 (Legislative policies)*. The text of that legislative objection procedure, as previewed in The Florida Bar *News* is attached hereto as Exhibit 1.

D. The Florida Bar's Current Legislative Procedures Appear Constitutionally Sound and Address Petitioner's Apparent Minority Position.

While yet to be sanctioned by this Court as a formal bylaw amendment within this organization's charter document, the Bar's procedure for resolving member challenges to specific positions taken in furtherance of its legislative program appears to be free of any constitutional defects. As noted previously, the Bar bound itself to such procedure in March 1987 upon its adoption of the measure as a Standing Policy of the Board of Governors.

That procedure is represented to be this organization's responsible creation of one "proper remedy" endorsed in *Gibson*, by applying the dictates of the United States Supreme Court's holding in *Chicago Teachers Union v. Hudson*, 475 U.S. ____, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) to this integrated state bar's particular legislative activities. Again, that issue is before this Court in another matter, and should influence further federal court review.

As current Bar policy, this legislative objection procedure as administered to date has necessitated two separate official notices of some 11 positions officially taken during this legislative session in the name of The Florida Bar. The initial April 1 notice within The Florida Bar *News* resulted in final pro-

tests from 12 of The Florida Bar's 40,000+ members regarding various of the seven legislative positions previewed; the second notice, on June 1, garnered seven member objections to the four measures highlighted as Bar positions. Final Bar action on those 19 cummulative objections resulted in decisions to refund a portion of each member's mandatory dues allocable to the contested legislative positions.

Remarkably, the Petitioner in the instant action did not register an objection to any of the legislative actions formally noted in his own member publication. Presumably, such action by petitioner would have resolved the bulk of his concerns expressed in this action.

As addressed in the Bar's Motion to Dismiss Petition, separately filed herein, Mr. Schwarz is "49 signatures short of that which is required by Bylaw 2-10.1(g)" to seek this Court's review. And, assuming those "similarly situated" to Petitioner are reflected in the 19 member objections filed to the series of published legislative positions *and* in the one communication referenced in the separate proceeding to review the codified objection procedure, itself duly noticed, there appears to be only some 20 members of this organization concerned enough about aspects of their Bar's legislative program to take the minimal steps necessary—and condoned by controlling United States Supreme Court case law—to seek relief readily available from this organization.

The Bar has never questioned the passion or sincerity of Petitioner's beliefs in this action. Indeed, he has acknowledged that this organization's governing Board has granted him personal audience on two occasions for expression of his concerns.

However, Petitioner's inaccurate understanding of the Board of Governors most recent legislative action, coupled with his apparent ignorance of news accounts and official notices in his Bar publications—as reflected throughout his Petition and addressed in our companion Response—nevertheless cast further doubt

on the merits of his proposal when viewed against the backdrop of a constitutionally sound procedure for resolution of individual member dissent from the Bar's legislative activities.

E. If Further Remedial Action on The Florida Bar's Legislative Procedures is Deemed Necessary by This Court, the Bar Should be Provided the Opportunity to Initially Study and Propose Such Measures.

Throughout this discussion, the Bar has detailed its open, responsible and democratic processes for resolution of the various issues generated by this organization's dynamic legislative program.

Approval from this Court for such activities continues. The Supreme Court of Florida has within its inherent power—and by Bar Rule 1-11.4, the specific authority—to intercede in the administration of this organization's internal procedures at any time. This tribunal has not done so. We interpret such action as some support of The Florida Bar's management acumen and the validity of its activities in the legislative arena.

Consistent with that interpretation, the Bar respectfully urges that if any aspects of its legislative procedures are needy of revisitation or further study, this organization should be provided the first opportunity to conduct that activity without the creation of any independent commission as urged by Petitioner.

This Court's July 7 order seeking the Bar's response to correspondence from Walter M. Meginniss regarding *The Florida Bar; Re: Amendment to Bylaw 2-9.3 (Legislative policies)* is viewed as an additional indication of reliance on this organization's ability to independently but responsibly craft a solution to its own problems. Our response in that action to review the Bar's codified procedure for legislative objections should provide additional authority to suggest the minimal merit, if not mootness, of Petitioner's claims in the instant action.

Even assuming the value of some independent study group, the Bar must observe that Petitioner's proposal, on its face, reflects shortcomings in its omission of four additional in-state law schools of comparable prestige and resources to complement the two institutions referenced. Similarly, there are even more state-funded and private Florida colleges and universities with government and political science scholars worthy of consideration for service on such a panel.

CONCLUSION

Petitioner's argument throughout this action is that the Supreme Court of Florida has failed to define or limit the scope of The Florida Bar's legislative program. In fact, such activities are well clarified and governed by a dynamic process that fully meets constitutional requirements and meaningfully addresses potential member challenges. Furthermore, Petitioner's concerns have been thoroughly reviewed by the governing Board of this organization and found to be of questionable merit or necessity. Petitioner's position is, at most, indicative of the views of an extremely small minority of bar members—all of whom can seek relief via existing organizational procedures. However, if further study of bar procedure were considered worthwhile by this Court, this organization should be allowed the opportunity to initially study such matters without the creation of a separate study group. In fact, such analysis appears to be ongoing in other matters before this Court which may be dispositive or moot Petitioner's claims.

Respectfully submitted,

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/s/ John F. Harkness, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. Thomas E. Schwarz, 4561 Northwest 79th Avenue, Lauderhill, Florida 33321, by mail this 27th day of July, 1987.

/s/ John F. Harkness, Jr.

Legislative policies amendment creates procedure for objecting to use of dues

The Florida Bar, pursuant to Bylaw 2-10.1(c), hereby gives notice of amendment to Bylaw 2-9.3, Legislative policies. The amendments create a procedure whereby members of The Florida Bar may object to use of Bar dues for specific legislative positions and a means to determine if a pro rata refund of dues should be made.

The entire text of Bylaw 2-9.3, as amended, is published below.

2-9.3 Legislative policies

(a) The Board of Governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the Board of Governors or two-thirds of the Executive Committee or by the president, as provided in the rules of procedure governing legislative activities.

(b) Publication of legislative positions. The Florida Bar shall publish notice of adoption of legislative positions in The Florida Bar News, in the issue immediately following the Board meeting at which the positions were adopted.

(c) Objection to legislative positions of The Florida Bar. Any active member of The Florida Bar may, within forty-five (45) days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(1) After a written objection has been received, the executive director shall promptly determine the pro rata amount of the

objecting member's dues at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

(2) Upon the deadline for receipt of written objections, the Board of Governors shall have forty-five (45) days in which to decide whether to give a pro rata refund to the objecting member(s) or to refer the action to arbitration.

(d) Composition of arbitration panel. Objections to positions of The Florida Bar may be referred by the Board of Governors to an arbitration panel comprised of three (3) members of The Florida Bar, to be constituted as soon as practicable following the decision by the Board of Governors that a matter shall be referred to arbitration.

The objecting member(s) shall be allowed to choose one member of the arbitration panel, The Florida Bar shall appoint the second panel member and those two members shall choose a third member of the panel who shall serve as chairman. In the event the two members of the panel are unable to agree on a third member, the chief judge of the Second Judicial Circuit of Florida shall appoint the third member of the panel.

(e) Procedures for arbitration panel. Upon a decision by the Board of Governors that the matter shall be referred to arbitration, the Florida Bar shall promptly prepare a written response to the objection and serve a copy on the objecting member(s). Such response and objection shall be forwarded to the arbitration panel, as soon as the panel is properly constituted. The arbitration panel shall thereafter confer and decide whether the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar dues.

(1) The scope of the arbitration panel's review shall be to determine solely whether the legislative matters at issue are within those acceptable activities for which compulsory dues may be used under applicable constitutional law.

(2) The proceedings of the arbitration panel shall be informal in nature and shall not be bound by the rules of evidence. The decision of the arbitration panel shall be binding as to the objecting member(s) and The Florida Bar. If the arbitration panel concludes the legislative matters at issue are appropriately funded from mandatory dues, there shall be no refund and The Florida Bar shall be free to expend the objecting member's pro rata amount of dues held in escrow. If the arbitration panel determines the legislative matters at issue are inappropriately funded from mandatory dues, the panel may order a refund of the pro rata amount of dues to the objecting member(s).

(3) The arbitration panel shall thereafter render a final written report to the objecting member(s) and the Board of Governors within forty-five (45) days of its constitution.

(4) In the event the arbitration panel orders a refund, The Florida Bar shall provide such refund within thirty (30) days of the date of the arbitration panel's report, together with interest calculated at the legal rate of interest as of the date the written objection was received by The Florida Bar.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

Case No. 70,702

THE FLORIDA BAR

RE: THOMAS R. SCHWARZ

Filed: August 19, 1987

REPLY TO ARGUMENT OF THE FLORIDA BAR IN SUPPORT OF ITS RETURN

The petitioner, THOMAS R. SCHWARZ, replies hereby to the return heretofore filed by The Florida Bar in this proceeding.

INTRODUCTION

The action before this Court is sui generis. Petitioner has taken the view that the order to show cause issued by the Court incorporates the petition. The issues are therefore made by the petition and the return. Under this view no reply is required in order to complete the pleadings.

In addition to its return the respondent has filed a motion to dismiss the petition. This motion is grounded on the view that having been deprived of his rights under Rule 2-10.2 through mistake of the Bar, the petitioner is relegated to proceedings under Rule 1-12.1. It is maintained that the Court improvidently entertained the petition addressed to its Rule 1-11.4 powers for correction of the Bar mistake. This subject is covered separately in an accompanying memorandum.

THE ISSUES AS TO AMENDMENT TO RULE 2-3.2(c)(4) DEFINING THE SUBJECT MATTER SCOPE OF POLITICAL ACTIVITY DELEGATED TO THE BAR

Issue I: Does the Supreme Court under Articles I, II, and V of the Florida Constitution have the right

to engage in political activity in furtherance of or opposition to substantive laws proposed without subject limitation?

Issue II: Has the Supreme Court defined the scope of its delegation of political power to the Bar with sufficient precision to confine its exercise to Article V powers in which in has a constitutionally declared compelling interest?

Issue III: May law licensees be forced to associate institutionally with an Integrated Bar engaged in political activity beyond that in which the Supreme Court has a specifically defined compelling State interest?

ARGUMENT

A. Issue I Argument

The limitation of power of the Supreme Court is the sine qua non in any study of the legitimacy of its ability to delegate. The source material is the Constitution of the State of Florida, specifically Articles V, I, and II. Without an understanding of the area of the Court's special constitutional competence, no legally rational evaluation of the propriety of its delegation of power can be made.

This matter is raised in the petition, but it is neither discussed in the Bar return nor the argument in support thereof.

Article V - The Judicial Department - establishes a system of courts for situational application of law, a system for their management, the power of regulation of practitioners, and procedures and a variety of other procedural and administrative powers. Nowhere does it provide to the Judicial Department a power to establish law. The power to establish law is the constitutional function of the Legislative Department. The exercise of the power to establish law is a political function residing exclusively in the Legislative Department.

In furtherance of the overall concept of limited governmental function, each department is prohibited by Article II from exercising a function of the other. In the end, residual political power is reserved for exercise by the people - not any governmental department.

Any power of the Judicial Department to engage in the process of establishment of law - other than by its situational application and interpretation - is not delegated but implied. Any implied power must be directly related to and inferable from a delegated power. The validity of any such implication of power must be strictly construed. In the area of establishment of law, a political function of the legislature, implication of power in the Judicial Department is not only constrained by the general rule with respect to implied power but specifically by Articles I and II of the Florida Constitution.

The first portion of the proposed amendment to Rule 2-3.2(c)(4) provides for a definition of scope of political activity consistent with any power legitimately implied from Article V:

> "(a) provided however that no such program shall consider or concern itself with current proposed or contemplated changes in the law except those directly related to the organization, administration, funding, creation or supervision of the system of Courts or the licensing, admission to practice or desciplining of lawyers and further provided that such programs of information and advice shall be executed by formal written communication by the Board of Governors (showing members dissent where applicable) to the officials of the courts or other branches of government. No funds shall be expended for lobbying or public relations activity in association with any program developed under this section nor contributed to any Political Action Committee."

B. Issue II Argument

The argument of the respondent in support of its return takes the position that this Court has sufficiently defined its power delegated to the Bar to engage in political activity in the establishment of law.

This claim is made without reference to the pertinent Articles of the Florida Constitution, without discussion of the implication of power, and without reference to Rule 2-3.2(c)(4). The latter Rule is the specific delegation to the Bar to intervene politically in the establishment of laws. On its face it is unlimited as to subject matter. It is this section to which the amendment proposing subject matter definition is addressed.

The contention of the Bar is that Rule 1-2 (the former preamble) and the decision of this Court in *The Florida Bar,* 439 So.2d 231, 215 (Fla. 1983) - hereinafter "Westman" - provide the necessary definition.

The refutation of this contention is best illustrated by the return itself and a comparison of the subject matter of political activity admitted in the return with that approved by this Court in *Westman.*

Paragraphs 13, 14, 16, and 17 of the return in relation to the Bar's admitted political activity states: "The Bar is without knowledge whether its actions in this regard constitute those of the Supreme Court of Florida." The possible predicates for these repeated statements can only be: (1) The Bar has private sources of power other than those delegated to it as the Court's official arm; (2) The laws of agency do not apply to the Bar; (3) The Bar is acting outide of its authorized scope; (4) By virtue of the vagueness of the description of its delegated powers the Bar is unable to determine its scope of authority; or finally (5) As suggested in paragraphs 10(c)(I) and 10(c)(III) of the return, the use of funds other than general funds provides a "cut out" and deniability."

A listing of the political activity specifically approved in *Westman* formed the predicate for the Court's decision not to stop all political activity by the Bar. The political activity currently engaged in by the Bar, as compared with that in *Westman,* refutes the Bar's contention that sufficient definition of its powers already exists:

Westman Case	**May 1987 Board of Governors (Return, Paragraph 10)**
1) Two separate refinements of Article V.	1) Legislation regarding lien priority on vessels polluting by oil spills.
2) Establishment of District Courts of Appeal.	2) Legislation regarding negligence standards for acts in emergency.
3) Merit retention of appellate judges.	3) Legislation regarding service of process on limited partnerships.
4) Creation of the Judicial Qualification Commission.	4) Legislation regarding insurance requirements for hospitals and physicians with respect to tort actions.
5) Approval of the interest on (lawyer) trust account program.	
6) Support of Florida Legal Services, Inc.	
7) General constitutional revision.	

The approved activity in *Westman* all relates to matters particularly associated with Article V powers: The establishment, management, and supervision of courts and the regulation of practice.

On the other hand, the political activity undertaken by the Board of Governors in May 1987 relates to purely general substantive subjects. To argue that *Westman* supports the unlimited subject matter political activity contended for and acted upon by the Bar is sheer sophistry - subtly fallacious reasoning or disputation. (Funk & Wagnall's Dictionary). The activities undertaken by the Bar clearly have no relation to Article V powers of the Court nor to the activities approved in *Westman*. The type of reasoning used by the Bar to attempt to equate *Westman* to a definition of power cries out the need for the Rule amendment.[1]

The proposed amendment definition clearly and specifically includes activities approved in *Westman*.

C. Issue III Argument

In the argument in support of its claim of the constitutionality of forcing law licensees to associate with an Integrated Bar having political power in subjects unrelated to Supreme Court Article V compelling State interest, the Bar refers to *Gibson v. The Florida Bar,* 798 F.2d 1564 (C.C.A. 11, 1986), and to a series of United States Supreme Court cases involving the political powers of labor unions.

Neither *Gibson* nor the series of labor cases relied on by the Bar decide the scope of political activity constitutionally permissible to an Integrated Bar. The *Gibson* opinion provided:

> "It should be stressed that this opinion addresses only the use of compelled fees by the Bar."

The *Gibson* petition was predicated upon the constitutionality of the use of compelled dues, not the impermissible scope of

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[1] Listings of 1985 and 1986 legislative priorities published in the official publication setting out Bar political aims show beyond peradventure that its May 1987 subject matter is typical.

that activity. The opinion "stresses" that fact. The proceeding points up the unsatisfactory character of ad hoc Federal court resolution of problems in the administration of Integrated Bars.

There are two dicta dealing with permissible scope. Footnote 4 of *Gibson* lists the type of matters thought by the Eleventh Circuit to be appropriate Bar activity:

> "Acceptable areas for Bar lobbying would include the following topics: (1) questions concerning the regulation of attorneys; (2) budget appropriations for the judiciary and legal aid; (3) proposed changes in litigation procedures; (4) regulation of attorneys' client trust accounts; (5) law school and Bar admission standards."

The subject matter listed comports with the approved political activity in *Westman* and is consistent with the Article V powers of this Court and the definition of scope set out in the proposed amendment to Rule 2-3.2(c)(4).

The use by the Bar of the dicta quoted on page 10 of argument in support of unlimited political power, is seriously misleading. It masks the dicta character of the statements, i.e., scope of activity was not before the court. It also inferentially asks this Court to adopt an analogy of power between the Bar and a trade union - an analogy rejected by the Court in its opinion and order creating the Bar itself:

> "(The Bar) is not a compulsory union but a necessary *one to secure the composite judgment of the bar on questions involving its duty to the profession and the public.* (E.S.)
>
> *Petition of Florida State Bar Association,* 40 So.2d 902, 908 (Fla. 1949)

The distinction as it relates to scope and source of power is crucial.

The Federal laws pertaining to labor union powers beginning with Section 7 of the National Recovery Act, through the

Wagner Act, the Taft-Hartley Act, and myriad others, are enacted under the General Welfare and Interstate Commerce clauses of the Federal Constitution. They declare that the Federal legislative interest in general welfare and management of interstate commerce is fostered by union activity in all fields of human activity. Union political activity under these broad areas is provided for and regulated and relates to the promotion of the well being of laborers in the entire spectrum of life. Even within this broad mandate and specific authorization, to comport with First Amendement rights and due process *in respect to property* (funding), compulsory dues cannot be used for purposes unrelated to collective bargaining. Expenses of collective bargaining can be used regardless of dissent under the "no free rider" concept.

An Integrated Bar is not created under the General Welfare or Interstate Commerce provisions. It is created as an aid to the Court in fulfillment of its Article V powers. Its engagement in politics, selecting legislative alternatives to solutions of broad social, commercial, and human problems, is inconsistent with separation of powers, an independent judicial department, and non-partisan selection, appointment, and retention of the judiciary. It is inconsonant with the concept that the Bar is not a union with power to promote the welfare of its members.

One further dictum in *Gibson* is instructive. The phrase "to promote administration of justice and to advance the science of jurisprudence" is characterized as "amorphous." The correctness of this characterization is confirmed by the Bar in paragraphs 13, 14, 16, and 17 of its return and its selection of subjects for political activity. The term 'amorphous' is defined as without form or shape. Your petitioner will not attempt to give meaning to the phrase "advance the science of jurisprudence." To the extent that the Bar has been a vehicle for accomplishment of that purpose, The Florida Bar Journal is the proper mechanism.

It is clear that the subjects discussed at the May 1987 Board of Governors meeting were not related to any such conception.

Neither were the arguments characterized by petitioner as "ad hominem" or "fatuous" possible contributions to jurisprudence.

Insofar as "administration of justice" has any definable meaning, it is the application of law - not its establishment. The phrase combination of "administration of justice" is so defined in the standard dictionaries. The phrase is not a term of legal art and, hence, is imprecise.

D. Pleading Issue Formed As To Second Portion Of Proposed Amendment to Rule 2-3.2(c)(4)

Issue: Should the general and ordinary execution of the Court's delegated political functions be conducted by formal, written, structured means as other Court business, or should it be involved with general public television ad and public relations campaigns and the personal, private lobbying of governmental officials of other departments?

This portion of the proposed amendment to Rule 2-3.2(c)(4) opts for the execution of the authorized political activity by the Bar in a formal manner. It requires open and direct communication with appropriate government officials. Courts act directly, openly and through written word. The fanning or inflaming of public opinion in support of or against a suggested political solution within the ambit of the Court's power is hardly consistent with the concepts of dignity or fairness of the court system. The regularization of political conduct avoids the problems occasioned by loose cannons or the actions of zealots.

In special circumstances the Bar could apply to this Court for approval of unique programs under its inherent power memorialized in Rule 1-11.4.

E. Proposed Amendment to Rule 10-2 For Change In Method Of Voting On Rule Amendments At The Annual Membership Meeting.

Issue: Is the current Rule qualifying only those present and voting at the annual meeting unfairly restrictive?

This proposed amendment would provide that suggested or proposed Rule changes for submission at an annual meeting be voted upon by mail ballot of all members as well as those present and attending the meeting.

Under the present Rule the Bar News reported that the recent meeting was attended by seven hundred members. Accordingly under the present Rule, there were seven hundred qualified voters. Under the proposed amendment there would have been more than forty thousand qualified voters. The present procedures under Rule 10-2 deny the vote to those whose condition of employment, financial status, or inability to control their schedule, inhibits the ability to attend the annual meeting in person. Included in this group are many members employed by governmental agencies, employed in direct service to the poor, or having young families with schedules geared to accommodate family needs. Under the proposed amendment on the subject of Rule changes to be considered by the general membership, there would be forty thousand qualified voters - not merely seven hundred as under the existing Rule. It seems obvious that with more than fifty times the number of qualified voters, broader participation would result.

The Bar return does not argue the desirability of broader participation, but simply denies that the proposed amendments "necessarily relate to any *democratization* of the Bar's rule amendment process." One cannot argue such a denial but only wonder if we are on the same planet.

CONCLUSION

Any serious reading of the proposed amendment to Rule 2-3.2(c)(4) shows that it has nothing to do with the funding of political activities. Its clear, primary purpose is to prevent any Bar political activity beyond subject matters appropriate to the proper powers of this Court through the agency of the Bar. Its secondary purpose is to prevent the use of private persons and mass media techniques in the exercise of governmental function (propaganda), and to provide accountability and control.

The Bar is not a union designed to support the well being of its members or the particular substantive law desires of its members or any of them. Since at least 1983 virtually none of the Bar's legislative activity has been directed to "*administration* of justice." It has been addressed to substantive law. The arguments admittedly made in support of its substantive law positions are, in the main, similar to those admitted in paragraph 10(d) of its return. While the return objects to the characterization of those arguments as "ad hominem" or "fatuous," they can hardly be considered an effort to advance the science of jurisprudence.

The Bar's return claims that under present conditions it does not know whether or not it is acting as agent of this Court. It is claimed that, by silence, this Court has approved its activities. To the extent that its activity is beyond the power of the Court or the Court's delegation of power to the Bar, it is an ultra vires infringement on licensees' rights.

The proposed amendment to Rule 2-3.2(c)(4) would end these doubts and provide guidelines consistent with constitutional requirements. The need for an amendment of this type grows not only out of the rights of licensees but, even more importantly, out of the need to establish clear guidelines in the separation of powers of the various departments of government. It is this separation that makes the Judicial Department independent, fair, and impartial. The intrusion by the Judicial Department into

general substantive law matters on the basis of political considerations destroys the essential characteristics of that Department. Such intrusion into political, substantive matters - appropriate only to private or special-interest bar associations - is not constitutionally permissible and is inconsistent with the concept of a separate, fair, and impartial Judicial Department when carried out by this Court's official arm.

Petitioner believes that the amendments proposed represent a proper solution. The matter of intergovernmental relationships is, however, an intricate, delicate, and complex one. Contrary to the contentions of the Bar, procedural refinement, technique, and notices cannot supply the subject matter jurisdiction. In argument at the top of page 9 of the Bar's return there are listed a number of Bar cases to illustrate the current foment in Bar management on this subject. They are no precedents; each jurisdiction is unique. The California Bar is organized under the corporation powers of its legislature and is provided with certain political powers. In the case cited, 226 Cal. Rptr. 448, the court nonetheless restrained outrageous (ad hominem) statements of the Bar. The New Hampshire case, 509 A.2d 753 (N.H. 1986), restricted political activity to appropriate (*Westman*-type) subjects. Some are private Bar activities. Each is unique.

The need for guidance action is urgent. Annual expenditures for these uncontrolled actions run at the rate of $500,000.00 to $700,000.00 per annum, which may be considered as a measure of the degree of Bar involvement.

Within the admitted limits of petitioner's erudition, the proposed amendments represent a correct, balanced, proper, and effective resolution of the problems discussed. In light of the petitioner's conceded limitations and the complex intergovernmental relations involved, the Court may wish to undertake further examination of the amendments and their underlying predicates. This possibility may suggest the desirability of a time-limited study commission made up of independent and

erudite persons. In that case, hopefully, the Court might temporarily restrict its official arm to political activity related to "the *administration* of justice (law)" and commit "the advancement of the science of jurisprudence" to The Florida Bar Journal.

I HEREBY CERTIFY that a copy of the foregoing was served by mail on August 10, 1987 upon: John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida 32301; Ray Ferrero, Jr., Esq., P.O. Box 14604, Fort Lauderdale, Florida 33302; Rutledge R. Liles, Esq., 901 Blackstone Building, Jacksonville, Florida 32202; John A. Boggs, Director of Lawyer Regulation, The Florida Bar, Tallahassee, Florida 32301.

THOMAS R. SCHWARZ
4561 N.W. 79th Avenue
Lauderhill, Florida 33321
Ph: 742-6979
(Fla. Bar #129383)

/s/ Thomas R. Schwarz
Thomas R. Schwarz

APPENDIX E

SUPREME COURT OF FLORIDA

No. 70,702

THE FLORIDA BAR

RE: THOMAS R. SCHWARZ

(June 2, 1988)

McDONALD, C.J.

In this petition Thomas R. Schwarz, a member of The Florida Bar, seeks the appointment of an ad hoc commission to study and report "on the legality, propriety, scope, and procedures, if any, through which this Court may exercise political power considering Articles I, II, and V of the Florida Constitution, the Code of Judicial Conduct, and such other materials and ethical principles as it may deem appropriate." The request comes not because of direct action taken by members of this Court, but because of the legislative and lobbying activities of The Florida Bar.

Prior to filing this petition, Schwarz proposed to the bar an amendment to rule 2-3.2(c)(4), Rules Regulating The Florida Bar, reading as follows:

> a. provided however that no such program shall consider or concern itself with current proposed or contemplated changes in the law except those directly related to the organization, administration, funding, creation or supervision of the system of Courts or the licensing, admission to practice or disciplining of lawyers and further provided that such programs of information and advice shall be executed by formal written communication by the Board of Governors (showing members' dissent where applicable) to the officials of the courts or other branches of government. No funds shall be expended for lobbying or public

> relations activity in association with any program developed under this section nor contributed to any Political Action Committee.

When he filed the instant petition, Schwarz' proposal had neither been formally accepted nor rejected by the board of governors. Schwarz avers that this Court has failed to place limits on or define the scope of "its delegation of political activity to its official arm."

In *Re Amendment to Integration Rule of The Florida Bar,* 439 So.2d 213, 213 (Fla. 1983), we rejected the following proposal: "The Board of Governors shall not engage in any political activity on behalf of The Florida Bar nor expend money or employ personnel for such purpose." In doing so, we restated the purpose of the bar as being "[t]o inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." *Id.* (quoting Fla. Bar Integr. Rule, Preamble).[1] We stated: "Clearly the improvement of the administration of justice and the advancement of the science of jurisprudence is a compelling state interest." *Id.* Later in the opinion we cited acts of The Florida Bar that we felt were within the purpose of Florida bar.[2] *Id.* at 214. Nevertheless, the definition of what activites are proper and what are improper continues to be a matter of dispute. We have not said what clearly should be excluded; perhaps we should.

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[1] The same language is now included in rule 1-2, Rules Regulating the Florida Bar.

[2] In approving the board of governors' engaging in political activites we relied on the existence of standing board policy 900, which provides that a position may not be taken on proposed legislation unless the board determines that the legislation is related to the pruposes of the bar. The board's decision may not be determinative, however, because the proposed action may not be within the range of permissible activities. The final determination of what should or should not be done does not necessarily rest with the board of governors.

To practice law in the courts of Florida we require that all lawyers be members of The Florida Bar. Exception can be made for a particular case, but, for the day-by-day practice, there is no exception — membership in The Florida Bar is compelled.[3] This compelled membership should limit the activities of The Florida Bar to the stated purposes. Some of the most sensitive differences of opinion among members of the bar originate from a disagreement about whether or not courses of action taken by the bar's governing body fall within or without those stated purposes. Florida is not unique in this dialogue.[4]

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[3] Two courts have recently found compulsory bar membership unconstitutional. Schneider v. Colegio de Abogados, Nos. CIV. 82-1459, CIV. 82-1513, CIV. 82-1514, CIV. 82-1532 (D. Puerto Rico Mar. 3, 1988) (failure to protect dissenters' rights makes compelled membership in bar association unconstitutional); Levine v. Supreme Court, 679 F.Supp. 1478 (W.D. Wis. 1988) (mandatory bar membership is a constitutionally impermissible burden on an individual's rights of association and speech).

[4] Several courts in addition to those listed in note 3, *supra,* have considered the impact of compulsory bar associations' activities on their members' rights. Arrow v. Dow, 544 F.Supp. 458 (D.N.M. 1982) (bar may use dues to support only functions and duties which serve important governmental functions; lobbying at issue did not do so); Virgin Islands Bar Ass'n v. Government of Virgin Islands, 648 F.Supp. 170 (D.V.I. 1986) (low-profile, nonpartisan bar association's limited legislative activity does not infringe on dissenters' rights); Bridegroom v. State Bar, 27 Ariz. App. 47, 550 P.2d 1089 (1976) (approved bar association's use of dues to advocate passage of a state constitutional amendment); Keller v. State Bar, 181 Cal. App. 3d 471, *printed at* 190 Cal. App. 3d 1196, 226 Cal. Rptr. 448 (state bar may not use compulsory dues to support ideological or political causes not germane to its statutory purposes), *review granted,* ____ Cal.3d ____, 723 P.2d 1, 229 Cal. Rptr. 144 (1986); Petition to Amend Rule 1 of Rules Governing the Bar, 431 A.2d 521 (D.C. 1981) (denied amendment limiting use of compulsory dues); In re Florida Bar Board of Governors' Action, 217 So.2d 323 (Fla. 1969) (denied petition for review, but did not adopt Justice Hopping's view that bar had virtually unlimited power to expend moneys for lobbying); Falk v. State Bar, 418 Mich. 270, 342 N.W.2d 504 (1983) (bar's use of mandatory dues in connection with political activities is a substantial governmental interest which outweighs infringement of dissenter's negative first

The Supreme Court of New Hampshire in *In re Chapman*, 128 N.H. 24, 509 A.2d 753 (1986), recently wrestled with this problem. In that case, Chapman sought to have the court enjoin the New Hampshire Bar Association (an integrated bar similar to Florida's) from actively opposing so-called "tort reform" legislation. The court noted that the issue was whether or not the board's decision to oppose tort reform was inconsistent with the powers and authorities conferred upon the bar association. The New Hampshire Court commented that it "is obligated to interpret the limits on bar activities so as to preclude the first amendment infringement that would result if the Association were to take positions on issues outside the scope of those responsibilities that justify compelling lawyers to belong to it." *Id.* at 31, 509 A.2d at 758. It then stated:

> In view of the Association's special status as a unified bar, we conclude that concerns for first amendment liberties require a narrower view of its permitted legislative activities than the Association has taken. Hence, the Association should limit its activities before the General Court to those matters which are related directly to the efficient administration of the judicial system; the composition and operation of the courts; and the education, ethics, competence, integrity and regulation, as a body, of the legal profession. The Board's opposition to tort revisions as a whole is not within the mandate of the Association's constitution. . . .

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amendment interests); Reynolds v. State Bar, 660 P.2d 581 (Mont. 1983) (state bar may not use compulsory dues for lobbying unless it makes refunds to dissenters); Petition of Chapman, 128 N.H. 24, 509 A.2d 753 (1986) (bar must carefully tailor its position on legislative activities to limited issues within its constitutional mandate in order to protect its members' individual rights); Petition to Review State Bar Bylaw Amendments, 139 Wis. 2d 686, 407 N.W.2d 923 (1987) (approves procedure by which member may challenge dues' use for legislative activities). *See also* Falk v. State Bar, 411 Mich. 63, 305 N.W.2d 201 (1981); Sorenson, *The Integrated Bar and the Freedom of Nonassociation—Continuing Seige*, 63 Neb. L. Rev. 30 (1983); Annot., 40 A.L.R. 4th 672 (1985).

> We believe that circumspection is the watchword to be observed by the Board. Where it can reasonably be argued that an issue is outside the scope of its authority, the Board should take no position on the matter. Where substantial unanimity does not exist or is not known to exist within the bar as a whole, particularly with regard to issues affecting members' economic self-interest, the Board should exercise caution. Positions taken by the Association and its Board should be tailored carefully and limited to issues clearly within the Association's constitutional mandate.

Id. at 32, 509 A.2d at 759.

We make no decision today on whether any existing specific activity of The Florida Bar is improper. We suggest, however, that the board of governors review its policies and current positions concerning political activity in light of the decisions of other jurisdictions.

This area needs further study. We decline to appoint a special committee as requested by Schwarz, but refer this matter to the Judicial Council for its comments and recommendations. We ask for a report from that body prior to the end of this calendar year. Schwarz' petition is granted to the extent set out in this opinion; any requests not discussed herein are denied.

It is so ordered.

OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Original Proceeding — The Florida Bar

Thomas R. Schwarz, in proper person, Lauderhill, Florida, for Petitioner

John F. Harkness, Jr., Executive Director and Paul F. Hill, General Counsel, Tallahassee, Florida; Ray Ferrero, Jr., President, Ft. Lauderdale, Florida; and Rutledge R. Liles, President-elect, Jacksonville, Florida,

for The Florida Bar, Respondent

APPENDIX F

SUPREME COURT OF FLORIDA

No. 70,702

THE FLORIDA BAR

RE: THOMAS R. SCHWARZ

[October 26, 1989]

GRIMES, J.

This is a continuation of *The Florida Bar re Schwarz,* 526 So.2d 56 (Fla. 1988), on the issue of what lobbying activities of The Florida Bar are permissible. As a creation of this Court, The Florida Bar is under our supervision and subject to our regulation.

In the original *Schwarz* opinion, we referred this matter to the Judicial Council for its comments and recommendations. The Council conducted public hearings on the subject. In its report, the Council first concluded that The Florida Bar could constitutionally engage in activities directed toward the administration of justice and the advancement of the science of jurisprudence. The report then stated:

> The integrated bar offers specialized skills, training, education, and experience with which to serve in an advisory function to the various branches of state government. The Council submits that the advice of the Bar is important to the legislature's deliberations within areas pertaining to the administration of justice. These issues may frequently be technical and complex and have effects not otherwise contemplated by the legislation. It appears that the Bar has an obligation, grounded upon the mandate of the integration rule setting forth the Bar's very purpose for existence, to speak out on appropriate issues concerning the courts and the administration of justice and ad-

> vise the legislative and executive branches of government of its collective wisdom with respect to these matters. To prohibit such communication would work a grave disservice to the people of this state and would infringe upon the free speech of the great majority of the state's attorneys. The Florida Bar has a reputation of pursuing improvements in the administration of justice and science of jurisprudence. The relative weight to be accorded these compelling interests appears to be of such great importance as to fully justify the relatively insignificant intrusion occasionally experienced by dissenting members of the Bar.

Judicial Council of Florida, Special Report to the Florida Supreme Court on Legislative Activities of The Florida Bar 6-7 (Dec. 1988) (on file with the Florida Supreme Court) [hereinafter Special Report on Legislative Activities]. In seeking to define the administration of justice and the advancement of the science of jurisprudence, the Council recommended that the following subject areas be recognized as clearly justifying legislative activities by the Bar:

> (1) Questions concerning the regulation and discipline of attorneys;
>
> (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
>
> (3) increasing the availability of legal services to society;
>
> (4) regulation of attorneys' client trust accounts; and
>
> (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

Special Report on Legislative Activities, *supra,* at 9. The Council also recommended that the following additional criteria be used to determine "the type of proposed legislative initiatives the Bar may become actively involved with when the legislation appears to fall outside of the above specifically identified areas:"

(1) That the issue be recognized as being of great public interest;

(2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matterr affects the rights of those likely to come into contact with the judicial system.

Id. at 9-10.

Thereafter, we entertained comments in response to the report and heard oral argument on the subject. Upon consideration, we have concluded that the Council's recommendations are well taken.

The Florida Bar was integrated by this Court in *Petition of Florida State Bar Association,* 40 So.2d 902 (Fla. 1949). Justice Terrell, writing for the majority, defined the integrated bar "as the process by which every member of the bar is given an opportunity to do his part in performing the public service expected of him, and by which each member is obliged to bear his portion of the responsibility." *Id.* at 904. He further stated that integration "provides a fair and equitable method by which every lawyer may participate in and help bear the burden of carrying on the activities of the bar instead of resting that duty on a voluntary association composed of a minority membership." *Id.*

As noted by Justice Terrell:

> Bar integration grew from a felt necessity for an organization that could speak for the profession in esse. It is not a compulsory union but a necessary one to secure the *composite judgment of the bar* on questions involving its duty to the profession and the public. . . .
>
> . . . The assault on our institutions which the bar is expected to take the leading role in challenging also requires the full manpower of the bar. We do not think bar integration would be worth the candle as a specific for unethical

> conduct, but as a means of giving the bar a new and enlarged concept of its place in our social and economic pattern.
> . . .

Id. at 908 (emphasis added).

In 1969 this Court denied a petition seeking to prevent the Board of Governors of The Florida Bar from lobbying for the adoption of the proposed revision of the Florida Constitution. *In re Florida Bar Board of Governors Action,* 217 So.2d 323 (Fla. 1969). In a concurring opinion, Justice Hopping succinctly observed:

> Since the inception of The Florida Bar, the Board of Governors has faced up to its professional responsibility of acting in the spirit of public service and has prepared and advocated adoption by the State Legislature of numerous enactments, including the Mechanics' Lien Law, the Uniform Commercial Code, the Public Defenders' Act, the law providing for filing of administrative rules in the Office of the Secretary of State, and major reforms in the substantive law of this State. It has sponsored adoption by the Legislature and the electorate of Florida, several constitutional amendments including the amendment creating the District Courts of Appeal and the Judicial Qualifications Commission. It has consistently advocated in the Legislature various improvements in the judicial system. Some of these matters were directly related to the administration of justice, some were toally unrelated to the administration of justice, and others were "political" in nature, using the word "political" in its broad sense as pertaining to the organization or administration of government.

Id. at 324 (Hopping, J., concurring).

In 1983 this Court denied a petition seeking to amend the integration rules to prevent the Board of Governors from engaging in any political activity on behalf of The Florida Bar. *In re*

Amendment to Integration Rule of The Florida Bar, 439 So.2d 213 (Fla. 1983). In reaching our conclusion, we pointed out that:

> [P]etitioners are made cognizant of the fact that any attorney "is still free to voice his own views on any subject in any manner he wishes. He can do this even though such views be diametrically opposed to the position taken by the unified bar of this state." *In re Unification of the New Hampshire Bar,* 109 N.H. 260, 266, 248 A.2d 709, 713 (1968). This may take the form of working within The Bar itself or its committees or it may be through external means. But he is never forced to adhere to or proclaim any political view or engage in any personally-repugnant political activity.

Id. at 215.

The California Supreme Court recently passed on the lobbying authority of its state bar which levies membership dues without the possibility of partial rebate. Reasoning that the words "advancement of the science of jurisprudence" should be read broadly in the context of lobbying activities, the court held that the bar was authorized to comment generally upon proposed legislation. *Keller v. The State Bar of California,* 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542 (1989), *cert. granted,* ____ S.Ct. ____ (Oct. 2, 1989). While that decision was broader than the one we reach today, we find most pertinent the following observation of the California court:

> Laws are the business of lawyers. The drafting of a proposed law, the understanding of the relationship between that law and existing legislation, and the appreciation of the practical impact of the proposed legislation are matters which often require expert legal knowledge and judgment. Whatever the subject of the proposed law, it is likely that among the members of the State Bar are some with the needed expertise, whose collective advice can lead to

> significant improvements in the legislative proposal. "The state has a valid interest in drawing upon [lawyers'] training and experience in order to promote improvements in the administration of justice and to advance jurisprudence. The better attuned the legal machinery is to the public's needs of health, safety, and welfare, the better the state will be able to perform its job of protecting and serving the public. The input and feedback on proposed legislation and court rules is invaluable to the state in fine-tuning its legislative and judicial systems."

Id. at ____, 767 P.2d at 1030-31, 255 Cal. Rptr. at 552 (citation and footnote omitted).

Several portions of the Rules Regulating The Florida Bar also support our conclusion. Thus, rule 1-2 states:

> The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.

Rule 2-3.2 of the Rules Regulating The Florida Bar further provides:

> Subject to the continued direction and supervision by the Supreme Court of Florida, the board of governors may, by amendment to this chapter, take all necessary action to:
>
> . . . .
>
> (c) Establish, maintain and supervise:
>
> . . . .
>
> (4) A program for providing information and advice to the courts and other branches of government concerning current law and proposed or contemplated changes in the law.

Most significantly, rule 2-9.3 of the Rules Regulating The Florida Bar specifies in part:

> RULE 2-9.3 LEGISLATIVE POLICIES
>
> (a) The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in rule 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

This rule insures that The Florida Bar will take a legislative position only after first independently focusing on the question of whether the subject matter is one in which the organized bar should become actively involved. In reaching this determination, the Board of Governors should refer to the criteria set forth in this opinion. However we also suggest that the Board exercise caution in the selection of subjects upon which to take a legislative position so as to avoid, to the extent possible, those issues which carry the potential of deep philosophical or emotional division among the membership of the Bar. In any event, we also wish to make clear that any member of The Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court.

In *The Florida Bar re Amendment to Rule 2-9.3,* 526 So.2d 688 (Fla. 1988), we approved an amendment to the Rules Regulating The Florida Bar to provide the mechanism for a lawyer who objects to legislative positions taken by The Florida Bar to obtain a partial rebate of bar dues. As part of the process, The Florida Bar is required to publish notice of adoption of legislative positions in The Florida Bar News in the issue immediately following the board meeting at which the positions

are adopted. In this manner, lawyers are alerted to the legislative positions being taken by The Florida Bar and by registering their objections they may be relieved of paying for their share of the expense attributable to the advocacy of the legislative positions with which they disagree. Consistent with the response filed by The Florida Bar in this action, we ask the Board of Governors to submit proposed amendments to this rule which will make clear that the Bar carries the burden of proof in such proceedings and providing that the names of objecting bar members, at their option, be kept private.

We approve the recommendations of the Judicial Council and adopt them as guidelines to be followed with respect to determining the scope of permissible lobbying activities of The Florida Bar.

It is so ordered.

EHRLICH, C.J., and OVERTON, SHAW, BARKETT and KOGAN, JJ., Concur
McDONALD, J., Dissents with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., dissenting.

I would limit the lobbying activities of The Florida Bar to the five subject areas which the Judicial Council recognized as "clearly justifying legislative activities" by the bar.

While there is some question on portions of the five subjects that the council finds clearly justified, the overwhelming view is that it is appropriate for The Florida Bar to participate in legislative activities in these designated areas. Few disagree that these areas fall within the stated purpose of the mandated membership of The Florida Bar. On the other hand, though supported by the majority of the board of governors of The Florida Bar, the council's suggestion that the bar may lobby on

issues of great public interest and in matters that lawyers are especially suited to and that affect the rights of those likely to come into contact with the judicial system has drawn serious comments and criticism. Some suggest that these criteria are so broad as to be a complete exception to any set of principles. I agree with this.

What distinguishes The Florida Bar from most other organizations is that all lawyers licensed in Florida must belong to it in order to practice their profession. It is this compulsory membership requirement that presents the strongest obstacle to the bar's discretionary lobbying under discussion. Many lawyers, because of their clients' interests or personal predilections, are in disagreement with positions of The Florida Bar on substantive issues and yet are compelled to be a member of an association espousing causes contrary to their beliefs. This presents some first amendment implications. Even without this concern, it appears to me that, except for matters directly attributable to the purpose of The Florida Bar, it is unwise and improper to compel membership and extract dues for causes or political goals antithetical to the beliefs or interests of individual members. In those matters falling outside the direct stated purpose of The Florida Bar it is better to leave lobbying activities to voluntary bar groups such as sections, political action committees, and the like. The lobbying activity of The Florida Bar should be restricted to the five "clearly justified" areas described in the council's report.

The majority does recognize that before taking legislative action it is incumbent on the board of governors first to find that the subject matter is one in which the organized bar should become actively involved. That decision should be determined on whether the proposed action comes within the definition of the stated purposes of The Florida Bar and as restricted by the five clearly defined areas.

I heartily approve of the concept that ready access to this Court be provided for a speedy resolution of issues questioning

the propriety of the bar's lobbying decisions. I trust that the board will act with such circumspection that such challenges will be few and without merit. This will be true if lobbying activities not clearly within the stated purposes of The Florida Bar are left with individual sections, or special groups. No restrictions extend to individual members of the bar; restrictions do and should extend to activities by or in the name of The Florida Bar.

Original Proceeding - The Florida Bar

Thomas R. Schwarz, in proper person, Lauderhill, Florida,
for Petitioner

Joseph W. Little, Gainesville, Florida; Ben L. Bryan, Jr. of Fee, Bryan & Koblegard, P.A., Ft. Pierce, Florida; and Henry P. Trawick, Jr., Sarasota, Florida,
Responding to Report

Rutledge R. Liles, President, Jacksonville, Florida; Stephen N. Zack, President-elect, Miami, Florida; John F. Harkness, Jr., Executive Director, John A. Boggs, Director of Lawyer Regulation, and Paul F. Hill, General Counsel, Tallahassee, Florida; and Barry Richard of Roberts, Baggett, LaFace & Richard, Tallahassee, Florida,
for The Florida Bar, Respondent

APPENDIX G

SUPREME COURT OF FLORIDA

Tuesday, December 19, 1989

Case No. 70,702

The Florida Bar,

Re: Thomas R. Schwarz

The Motion for Rehearing or Clarification filed by Joseph W. Little is hereby denied.

EHRLICH, C.J., OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC

cc: Joseph W. Little, Esquire
Henry P. Trawick, Jr., Esquire
John F. Harkness, Esquire
Barry Richard, Esquire
Ben L. Bryan, Jr., Esquire
Thomas R. Schwarz, Esquire
John T. Berry, Esquire

IN THE SUPREME COURT OF FLORIDA

Case No. 70,702

The Florida Bar

Re: Thomas R. Schwarz

Motion for Rehearing or Clarification

Pursuant to Fla. R. App. Proc. R. 9.330(a), Petitioner, Joseph W. Little, hereby petitions this honorable Court for a rehearing in this case on matters addressed below, or, in the alternative, for the issuance of a revised opinion clarifying the matters addressed below.

The essential thrust of this petition is that the Court's initial opinion has "overlooked or misapprehended" points of law and fact. The essential points of law are Petitioner's assertions that the Court's initial opinion has not supplied a cogent answer to the issue of where the Court itself gets the power to authorize its creation, The Florida Bar, to engage in wide political legislative lobbying activities that go far beyond the powers allocated to the Court by the Florida Constitution, and, furthermore, the initial opinion has relied upon authorities that are not supportive of its decision.

First, the Court has relied upon the initial integration decision, 40 So.2d 902 (Fla. 1949), without acknowledging that it was issued under the markedly different 1885 constitution and that the legislature had at that time broadly allocated powers to the Supreme Court to prescribe rules of practice and procedure. §25.03 Fla. Stat. (1949).

Second, the Court's initial opinion continues to rely upon *In re Unification of the New Hampshire Bar,* 248 A.2d 709 (N.H. 1968) in justification of its decision, but fails to acknowledge that the initial activities of the New Hampshire Bar were subsequently sharply restricted by *Chapman v. Supreme Court of*

New Hampshire, 509 A.2d 753 (N.H. 1986). There, the New Hampshire Supreme Court held:

> In view of the Association's special status as a unified bar, we conclude that concerns for first amendment liberties require a narrower view of its permitted legislative activities than the Association has taken. Hence, the Association should limit its activities before the General Court [i.e. the legislature] to those matters which are related directly to the efficient administration of the judicial system: the composition and operation of the courts; and the education, ethics, competence, integrity and regulation, as a body, of the legal profession. The Board's opposition to tort revision as a whole is not within the mandate of the Association's constitution. In essence, to interpret the phrase "administration of justice" in the Association's constitution as broadly as the dissenters [to this decision] do would be to eliminate any limitation on the legislative activities of the association where one was clearly intended.
>
> We believe that circumspection is the watchword to be observed by the Board. Where it can reasonably be argued that an issue is outside the scope of its authority, the Board should take no position on the matter. Where substantial unanimity does not exist or is not known to exist within the bar as a whole, particularly with regard to issues affecting member's economic self-interest, the Board should exercise caution. Positions taken by the Association and its Board should be tailored carefully and limited to issues clearly within the Association's constitutional mandate. Of course, nothing prevents officers and members of the Board from appearing before the associations or as representatives of clients.

509 A.2d at 753. (Material in brackets supplied.)

Finally, this Court's initial opinion relies upon *Keller v. The State Bar of California,* 767 P.2d 1020 (1989) for a broad

reading of the powers of the State Bar. The Court's opinion fails to acknowledge, however, the State Bar of California is a creation of the California *legislature* and not of the California courts. 767 P.2d at 1023, 1024. Thus, the source of power in *Keller* is the broad and general police powers of the legislature and not the restricted regulatory powers of a court. In all due respect to this Court, Petitioner asserts that while the entire judicial power of the State is within its scope, its legislative powers including the legislative powers to empower The Florida Bar are narrowly and specifically defined by the Florida Constitution.

Finally, Petitioner notes that the Court's initial decision states "In any event, we also wish to make clear that any member of the Florida Bar in good standing may question the propriety of any legislative position taken by the Board of Governors by filing a timely petition with this Court." (p.7) Again in all due respect to the Court, Petitioner asserts that its initial decision provides inadequate guidelines (p.p. 2-3) to permit objectors to understand the basis of any decision that the Court might make. Indeed, any such petition would merely be asking the Court to substitute its judgment for that of the Board as to what is of "great public interest," what things lawyers are "especially suited" to evaluate, and what subjects affect "the rights of those likely to come into contact with the judicial system." In short, the application of this rule imposes not a "rule of law" but a "rule of men," which runs against one of the deepest traditions of constitutional governance.

Finally, the Court's initial opinion proposes some small changes to the rules (p.7) in an apparent effort to avoid First Amendment infringements. In the initial submission in this matter, Petitioner addressed the issue of *sources* of power, and avoided extended discussion of First Amendment limitations. Although the First Amendment issues are now on review in the United States Courts of Appeal for the Eleventh Circuit in *Gibson v. The Florida Bar,* No. 89-3388, and in the United States

Supreme Court in *Keller v. State Bar,* No. 88-1905, Petitioner herein is of the firm opinion that Rule 2-9.3 denies the First Amendment rights of dissenting members when applied with the breadth permitted by the Court's initial decision in this matter. The risk of that infringement could be drastically reduced by deleting the Bar's powers to engage in lobbying activities under the "additional criteria" stated at the top of page 3 of the Court's initial opinion.

Conclusion

In conclusion, Petitioner requests the Court to grant a rehearing on the matters mentioned herein, or failing that, to issue a revised opinion to clarify the points referred to herein, and specifically to delete that portion of the opinion that grants the Board lobbying authority under the additional criteria.

Respectfully submitted,

/s/ Joseph W. Little, Petitioner
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Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing was mailed by the United States postal service to each of the following persons on the 6th day of November 1989:

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